IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN TELECOM, INC., Plaintiff,	:	
v.	:	CIVIL ACTION NO. 99-3795
FIRST NATIONAL COMMUNICATIONS NETWORK, INC., Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J. JUNE 2, 2000

Plaintiff, American Telecom, Inc. ("ATI") has filed a Motion for Entry of Judgment by Default in its favor and against Defendant, First National Communications Network, Inc. ("FNC"). In response, FNC has filed a Motion to Set Aside Default and to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction.

The Complaint in this case seeks damages for breach of contract and unjust enrichment arising from an agreement between the parties whereby ATI would provide FNC with telemarketing services to generate sales on behalf of FNC for three of FNC's clients. These services included outbound telemarketing and attendant support services, daily report generation, monitoring, quality assurance and program review meetings. ATI alleges that FNC has failed to pay for telemarketing services rendered by ATI to FNC's clients. For the following reasons, ATI's Motion for Entry of Judgment of Default will be denied, FNC's Motion to Set Aside Default will be granted, and FNC's Motion to Dismiss

Plaintiff's Complaint for Lack of Personal Jurisdiction will be denied.

I. PROCEDURAL BACKGROUND

ATI initiated this action against FNC by filing the Complaint on July 27, 1999. ATI purportedly sent the Summons, Complaint, and a Notice of Lawsuit and Request for Waiver of Service of Process to FNC on August 2, 1999. Because the Waiver of Service of Summons had not been returned, ATI served the Summons and Complaint on FNC by certified mail, return receipt requested. FNC received the mailing on November 16, 1999.

FNC's California counsel, Joseph P. Rosati, Esquire, attempted to locate and retain local counsel in Pennsylvania. During this time, Mr. Rosati had his paralegal, Beverly Lindahl, contact ATI's counsel to request an extension of time in which to respond to the Complaint. Based on Ms. Lindahl's telephone discussion with ATI's counsel, Mr. Rosati confirmed by letter, dated December 7, 1999, that FNC had been granted a two-week extension of time. (Rosati Decl. ¶¶ 4-6 & Attach.)

Having been unsuccessful in retaining local counsel, on December 20, 1999, Mr. Rosati placed another call to ATI's counsel and left a message requesting additional time. (Rosati Decl. ¶¶ 4, 7.) On the following day, December 21, 1999, counsel for ATI faxed a letter to Mr. Rosati disputing that any extension of time within which to answer the Complaint had been granted and

notifying Mr. Rosati that steps had already been taken to file for a default. (Rosati Decl. ¶ 7 & Attach.)

On December 22, 1999, ATI filed a Request for Entry of Default in its favor and the Default was entered on that date. Subsequently, on January 5, 2000, Plaintiff filed a Motion For Entry Of Judgment By Default. However, FNC has now retained local counsel and has responded by filing a Motion to Set Aside Default and to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction.

II. DISCUSSION

Defendant's Motion to Set Aside Default is made pursuant to Federal Rule 55(c) which allows, "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." FED. R. CIV. P. 55(c). The decision of whether to set aside the default and reach a decision on the merits is within the discretion of the trial court. See United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 194 (3d Cir. 1984)(citations omitted). "Default is not favored and doubt should be resolved in favor of setting aside a default and reaching a decision on the merits." 99 cents Stores v. Dynamic Distribs., No. CIV. A. 97-3869, 1998 WL 24338, *4 (E.D. Pa. Jan. 22, 1998)(citing Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982)). Thus, Rule 55(c) motions are generally construed in

favor of the movant. See Momah v. Albert Einstein Med. Ctr., 161 F.R.D. 304, 307 (E.D. Pa. 1995)(citing Hamilton v. Edell, 67 F.R.D. 18, 20 (E.D. Pa. 1975)).

A. SERVICE OF PROCESS

In this case, the parties first dispute whether the default should be set aside based on how the Complaint was served. See Atlas Communications v. Waddill, No. CIV. A. 97-1373, 1997 WL 700492, *2 (E.D. Pa. Oct. 31, 1997) ("A default `entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside.'"). Because the propriety of service is at issue, both Pennsylvania and California law are applicable.[1] See FED. R. CIV. P. 4(e) (providing, where waiver of service has not been received, that service on a defendant be made pursuant to the law of the state in which the district court is located **or** in which service is effected).

Under Pennsylvania law, "Original process shall be

[1] It is worth noting that paragraph 16 of the contract between the parties provides that "[t]his Agreement is made in accordance with and governed by the laws of the State of California." (Pl.'s Compl., Ex. A.) This Court acknowledges that "[w]here the parties to a contract effectively choose the law of one state to govern the contract, that choice should control." Financial Software Sys. v. First Union Nat'l Bank, No. Civ. A. 99-623, 1999 WL 1241088, *2 (Dec. 16, 1999). However, because choice of law provisions in contracts are generally understood to incorporate only substantive law, and not procedural law, see Maiocco v. Greenway Capital Corp., No. CIV. A. 91-0053, 1998 WL 48557, *4 (E.D. Pa. Feb. 2, 1998), it will be necessary to examine Pennsylvania's service requirements.

served outside the Commonwealth . . . by mail in the manner provided by Rule 403." Pa. R. Civ. P. 404. Rule 403 provides that " . . . a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent." According to ATI, service of process occurred by certified mail – return receipt requested, which satisfies the Pennsylvania rules.

In response, FNC correctly points out that service was not made by "restricted delivery" mail, and, thus, did not comply with Pa. R. Civ. P. 403. See Leggett v. Amtrak, Civ. A. No. 90-3007, 1990 WL 182148, *1 (E. D. Pa. Nov. 26, 1990) (service of process was not made in accordance with Pennsylvania law where summons and complaint sent by certified mail without restricted delivery); State Farm Fire & Cas. Co. v. King of Fans, Civ. A. No. 87-4593, 1988 WL 16975, *1 (E.D. Pa. Feb. 25, 1998) (where plaintiff did not send its complaint via restricted delivery, there was no assurance that duly authorized agent received service). Indeed, the summons and complaint in this case was addressed to Michael Holleran, CEO of FNC; however, the return receipt clearly shows that service was not made by restricted delivery and was signed by K. Finneran with no indication as to Finneran's authority to accept service of process on behalf of FNC. Because there is no assurance that Finneran was a duly authorized agent for FNC, it is impossible to conclude that

service of process was made in conformity with Pa. R. Civ. P. 403. Id.

A different result occurs under California law. In this regard, § 417.20 of the California Code of Civil Procedure provides that if service of a summons is by mail pursuant to § 415.40, proof of service shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed return receipt or other evidence. Neadeau v. Foster, 129 Cal. App.3d 234, 237, 180 Cal. Rptr. 806, 807 (1982); Dill v. Berquest Constr. Co., 24 Cal. App.4th 1426, 1439, 29 Cal. Rptr.2d 746, 753 (1994) ("[T]here must be evidence `establishing actual delivery to the person to be served . . . .'"). "The plaintiff has the burden of demonstrating by a preponderance of the evidence that all jurisdictional criteria are met." Taylor-Rush v. Multitech Corp., 217 Cal. App.3d 103, 110, 265 Cal. Rptr. 672, 675 (1990).

ATI argues that "under California law, where, as here, the record contains an affidavit of service stating that the process was mailed to the defendant and that the return receipt was signed, not by the defendant but by an employee who was authorized to accept mail for the defendant, then it is the defendant's burden to refute such evidence." (Pl.'s Opp'n Mem. at 7.) ATI is correct in that the filing of a proof of service creates a rebuttable presumption that the service was proper as

long as the proof or service complies with the applicable statutory requirements. Floveyor Int'l, Ltd. v. Superior Court of Los Angeles County, 59 Cal. App.4th 789, 795, 69 Cal. Rptr.2d 457, 461 (1997). Thus, in order to establish actual delivery by mail to the person to be served under § 417.20, it must be shown that the summons was mailed to a person or persons who may be served, and `the name, title or representative capacity, if any, . . . of such person or persons . . . .'" Dill, 24 Cal. App.4th at 1442, 29 Cal. Rptr.2d at 755 (citing Judicial Council Report, comment to section 417.20, p. 59.)

Here, ATI properly addressed the summons and complaint to Michael Holleran, FNC's Chief Executive Officer. Because the Affidavit of Service complies with the minimum statutory requirements, a resulting presumption of proper service arises under California law. See Floveyor, 59 Cal. App.4th at 795, 69 Cal. Rptr.2d at 461; Dill, 24 Cal. App.4th at 1442, 29 Cal. Rptr.2d at 755; Neadeau, 129 Cal. App.3d at 237, 180 Cal. Rptr. at 807. Accordingly, FNC's failure to offer any evidence that service was not received or that the person who signed the return was not authorized to receive it is fatal to FNC's motion as far as service is concerned.

B. TEST TO SET ASIDE DEFAULT

Next, FNC contends that, even if the default is not set aside as a matter of right for insufficient service of process,

this Court should deny ATI's Motion for entry of a default judgment as a matter of discretion. Four factors must be considered by a court ruling on a motion to set aside default judgment under Rule 60(b)(1): (1) whether the plaintiff will be prejudiced; (2) whether the default was the result of the defendant's culpable or excusable conduct; (3) whether the defendant has a prima facie meritorious defense; and (4) whether alternative sanctions would be effective. Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987); see also $55,518.05 in U.S. Currency, 728 F.2d at 195 (citations omitted). Each factor is examined hereafter.

1. Prejudice to Plaintiff

The first factor to consider in ruling on the motion to set aside the default judgment is whether the Plaintiff will be prejudiced by the failure to set aside the default. The United States Court of Appeals for the Third Circuit, in analyzing this factor, "has considered the loss of available evidence, the increased potential for fraud or collusion, and the plaintiff's substantial reliance on the default." Choice Hotels Int'l, Inc. v. Pennave Assocs., Inc., No. CIV. A. 98-4111, 2000 WL 133954, at *3 (E.D. Pa. Feb. 4, 2000) (citing Feliciano v. Reliant Tooling Co., 691 F.2d 653, 657 (3d Cir. 1982) and Hartsoe v. Kmart Retail Distrib. Ctr., Nos. CIV. A. 99-429 and 99-461, 2000 WL 21263, at *3 (E.D. Pa. Jan. 13, 2000)).

This factor weighs heavily in favor of setting aside the default against FNC. First, the fact that ATI will have to prove its claim on the merits rather than proceed by default does not constitute prejudice. Choice Hotels, 2000 WL 133954, at *3 (citing Duncan v. Speach, 162 F.R.D. 43, 45 (E.D. Pa. 1995)). Second, ATI cannot establish that the minor delay in the proceedings would inhibit its ability to locate witnesses, obtain evidence, or otherwise prove its case or collect on any judgment that it may ultimately obtain. Based on the above, this Court concludes that ATI will not be prejudiced by litigating the merits of its claims.

2. Defendant's Conduct

The second area of inquiry is whether Defendant's failure to timely answer the Complaint was the result of culpable conduct, the test being whether the Defendant's actions were done willfully or in bad faith. Feliciano, 691 F.2d at 657. FNC contends that the record in this case shows precisely the opposite. In this regard, FNC highlights Mr. Rosati's efforts to request extensions of time to enable him to locate and retain local counsel in Philadelphia for his California-based client, and how he learned that ATI had already set the default process in motion. FNC argues that even though ATI disputes whether any extension of time was initially agreed to, the fact that ATI's counsel failed to respond to Mr. Rosati's December 7th letter to

deny that an extension had been granted, along with his rush to file a default two weeks later, raises serious questions about the good faith of ATI's counsel. To further support this contention, FNC points out that ATI's counsel communicated on December 21, 1999, that by the time he received Mr. Rosati's December 20 request for additional time, he had "already taken steps to file for a default," yet, the Affidavit accompanying the Request for Entry of Default was dated December 21, 1999, and the Court's docket shows that the Request was not filed until December 22, 1999.

On the other hand, ATI reminds this Court that FNC has offered no explanation of its failure to acknowledge the initial mailing of the Summons and Complaint or to waive formal service, nor has FNC disputed that it received the Complaint and the Summons via certified mail on November 16, 1999. Furthermore, ATI asserts that FNC has failed to explain why it took no action until December 6, 1999, the date that a response was due. Finally, ATI contends that despite the fact that no extension of time was agreed to, FNC sent a letter ignoring ATI's position and disregarded a later attempt by ATI to discuss the matter. Thus, according to ATI, FNC's reckless disregard for repeated communications from ATI shows that FNC acted culpably, and, therefore, the default must not be disturbed. (Pl.'s Opp'n Mem. at 12-13) (citing Kauffman v. Cal Spas, 37 F. Supp.2d 402, 405

(E.D. Pa. 1999)).

Although FNC's failure to file a timely answer in the case at hand cannot be condoned by this Court, Defendant's conduct does not demonstrate the type of flagrant bad faith that warrants the extreme action of refusal to vacate the default judgment. As the Rosati Declaration indicates, FNC experienced difficulty obtaining local counsel to represent FNC in the instant action. (Rosati Decl. at ¶ 4.) While FNC may have been negligent in failing to respond to the Complaint in a timely manner, its counsel at least attempted to get extensions of time for filing a response, and, although ATI disputes agreeing to any extension, FNC's conduct was not willful and does not constitute bad faith. See E.I. DuPont De Nemours & Co. v. The New Press, Inc., No. CIV. A. 97-6267, 1998 WL 159050 (E.D. Pa. March 16, 1998) (finding that defendant's conduct was not culpable where defendant experienced difficulty obtaining counsel); see also Heleasco Seventeen, Inc. v. Drake, 102 F.R.D. 909, 917 (D. Del. 1984) ("The affidavits and answers to interrogatories submitted by defendants demonstrate that, between the time of the commencement of this action and the entry of default, the defendants believed that they had a reasonable extension of time to secure local counsel and to prepare their answer.").

3. Meritorious Defenses

The next factor to consider in determining whether

relief from a default judgment should be granted under Rule 60(b) is whether the defendant's allegations, if established at trial, would make out a meritorious defense. Heleasco Seventeen, 102 F.R.D. at 916. "In considering whether the defendant adduces a meritorious defense, courts search for either a specific recitation of facts that support a `reasonable showing' of a meritorious defense . . . or at least a credible allegation that such a defense exists." Gen. Tire & Rubber v. Olympic Gardens, 85 F.R.D. 66, 69 (E.D. Pa. 1979). In this case, FNC first asserts that the Complaint should be dismissed because FNC is not subject to personal jurisdiction in Pennsylvania.

(a) Personal Jurisdiction

"Under Rule 4(e) of the Federal Rules of Civil Procedure, the service of process rules of the state where the court sits govern personal jurisdiction issues." AMP Inc. v. Methode Elecs., Inc., 823 F. Supp. 259, 262 (M.D. Pa. 1993). With respect to nonresident defendants, the Pennsylvania long-arm statute, 42 Pa.C.S.A. § 5322(b)[2], permits Pennsylvania courts to

[2] Section 5322(b) provides:

> In addition to the provisions of subsection (a), the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United

exercise personal jurisdiction "to the constitutional limits of the Due Process Clause of the Fourteenth Amendment." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992). Therefore, this Court must assess whether application of the Pennsylvania long-arm statute to the facts presented violates the Due Process Clause.

"Personal jurisdiction is a fact-specific inquiry. The focus is on the relationship among the defendant, the forum state and the litigation." AMP, 823 F. Supp. at 262. Once a defendant has properly raised a jurisdictional defense, the plaintiff bears the burden of proving, either by affidavits or other competent evidence, that the defendant has had sufficient contacts with the forum state to establish personal jurisdiction. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). "To meet this burden, the plaintiff must establish either that the particular cause of action sued upon arose from the defendant's activities within the forum state (`specific jurisdiction') or that the defendant has `continuous and systematic' contacts with the forum state (`general jurisdiction')." Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir.

States.

42 Pa.C.S.A. § 5322(b) (Purdon's 1981).

1987) (citations omitted).

"Specific jurisdiction arises when the plaintiff's `claim is related to or arises out of the defendant's contacts with the forum.'" Mellon Bank, 960 F.2d at 1221. In such a case, due process requires the plaintiff to prove that the defendant purposely availed itself of the privilege of conducting business within the forum State, thus invoking the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958). A court may go forward if, after examining the relationship among the defendant, the litigation, and the forum, "the defendant's conduct and connection with forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Not surprisingly, the parties in this case have supplied different descriptions of the events that make up their contractual relationship. According to ATI, FNC sought out and solicited ATI by sending materials to Pennsylvania and cultivated the relationship with ATI by drafting and sending to ATI a contract that was specifically intended to create and govern an ongoing business relationship between them.[3] In addition, ATI

[3] ATI submits that FNC drafted a contract that was for an indefinite period, and solicited ATI on four separate occasions to perform four different projects by sending faxes to ATI in Pennsylvania.

informed FNC that it would be performing the work in Pennsylvania, ATI performed work for FNC on three different projects from its facility in Pennsylvania, FNC specifically directed ATI to place telemarketing calls to Pennsylvania telephone numbers, ATI made numerous calls and sales to Pennsylvania based companies on behalf of FNC, and the parties had a continuous business relationship which lasted several months.[4] Based on the above characterization of events, ATI contends that FNC had sufficient contacts with Pennsylvania such that it could "reasonably anticipate being haled into court" in this jurisdiction.

FNC replies that its initial contact consisted of a one-page, form letter solicitation sent by fax. FNC also highlights the undisputed fact that all of the contacts between the parties took place by telephone, fax and mail, rather than in-person contact within Pennsylvania. Finally, in response to ATI's assertion that FNC was aware that ATI would perform the telemarketing services within Pennsylvania, FNC states that nothing in the contract required ATI to do so, and further argues that ATI cannot establish minimum contacts by FNC on the basis of ATI's own unilateral choice to perform the contract in Pennsylvania. (Def.'s Reply Mem. In Supp. of Mot. to Set Aside

[4] FNC communicated with ATI by mail, phone and fax throughout their relationship.

Default and to Dismiss Pl.'s Compl. at 3.)

"The mere existence of a contract between the non-resident defendant and the resident plaintiff does not, by itself, establish personal jurisdiction . . . ." AMP, 823 F. Supp. at 264. In the Eastern District of Pennsylvania, courts have generally considered and balanced four factors identified in Strick Corp. v. A.J.F. Warehouse Distributors, Inc., 532 F. Supp. 951 (E.D. Pa. 1982), when evaluating contacts where a non-resident is involved in a contract with a Pennsylvania resident: (1) the character of the precontract negotiations; (2) the location of those negotiations; (3) the terms of the sales agreement; and (4) the type of goods sold. Id. at 958; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985) (opining that lower courts must evaluate "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . in determining whether the defendant purposefully established minimum contacts within the forum.").

In the instant action, the contract between the parties was initiated by FNC, negotiated on the telephone between representatives of ATI in Pennsylvania and representatives of FNC in California and executed copies of the contract were exchanged

by fax.[5] In addition, FNC became aware that ATI would perform the telemarketing services in Pennsylvania and, thus, could reasonably foresee that the signing of the agreement would lead to economic impact in Pennsylvania. See Mickleburgh Mach. Co. v. Pacific Econ. Dev. Co., 738 F. Supp. 159, 161 (E.D. Pa. 1990) (holding that California corporation had sufficient contacts to be subject to personal jurisdiction in Pennsylvania). While the Agreement between the parties does not require performance in Pennsylvania, FNC's choice to do business with a Pennsylvania telemarketing company can be viewed as an intent on the part of FNC to inject itself into the commerce of Pennsylvania. See Telespectrum Worldwide v. MBNA Canada Bank, No. CIV. A. 98-6292, 1999 WL 239112, *3 (E.D. Pa. April 16, 1999) ("Out of all of the telemarketing companies defendant could have chosen, including those based in Canada, defendant contracted with TeleSpectrum in Pennsylvania."). Finally, with respect to the type of goods sold, there is justification for asserting jurisdiction over a non-resident purchaser of telemarketing services. Id. at *4 (Canadian Bank's course of dealing with Pennsylvania-based telemarketing company throughout three-month period in which agreement between parties was in effect supported existence of

[5] After FNC's initial contact with ATI, a series of conversations occurred between the parties, some of which were faxes and telephone calls from various representatives of FNC to ATI's offices in Pennsylvania. (Quinn Aff. at ¶ 3.)

jurisdiction). Here, ATI performed three telemarketing projects in Pennsylvania for FNC, during which FNC kept in contact by phoning and faxing ATI's Pennsylvania offices. In connection with each of the three projects, FNC dictated the telephone numbers to be called by providing ATI with a list of phone records, including names and telephone numbers located in Pennsylvania that resulted in sales to Pennsylvania entities. (Second Aff. of John Quinn at ¶¶ 3-6.)

Based on the above, this Court concludes that the four Strick factors weigh in favor of Plaintiff. Accordingly, this Court can properly assert specific jurisdiction over FNC.[6]

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[6] ATI also contends that FNC's unrelated contacts with Pennsylvania are sufficient to establish general personal jurisdiction. The general jurisdiction threshold, however, is much higher than that for specific jurisdiction, as "the plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction. The nonresident's contacts to the forum must be continuous and substantial." Provident Nat'l Bank, 819 F.2d at 437 (citations omitted). In this regard, ATI lists the following general contacts maintained by FNC with Pennsylvania support the exercise of general personal jurisdiction: (1) FNC conducts telemarketing projects using random national calls, which necessarily result in calls to Pennsylvania, (2) FNC uses approximately five Pennsylvania-based telemarketing companies, a.k.a. "network sites," to perform telemarketing services for it as subcontractors, (3) the control FNC exercises over the Pennsylvania network sites consists of monitoring their work, training their employees and providing the scripts and phone records for the projects, (4) FNC employees have traveled to Pennsylvania to conduct training of the telemarketing agents at the Pennsylvania network sites, (5) FNC has performed services for at least one client located in Pennsylvania, (6) FNC has leased equipment from a Pennsylvania company, and (7) FNC approved a news release advertising its services in at least one trade journal with a national circulation, including Pennsylvania. Despite the above, this

Whether specific or general jurisdiction is invoked, the exercise of jurisdiction over the non-resident defendant must also be consistent with "traditional notions of fair play and substantial justice." AMP, 823 F. Supp. at 262 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

> The considerations to be weighed include: 1) the burden litigation in the forum state would impose on the defendant; 2) the forum State's interest in adjudicating the dispute; 3) the plaintiff's interest in obtaining "convenient and effective relief"; 4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and 5) the "shared interest of the several States in furthering fundamental substantive social policies."
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> Under this second tier analysis, the "[m]inimum requirements inherent in the concept of `fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." Application of this second tier analysis is discretionary with the court and appropriate only in certain cases.

AMP, 823 F. Supp. at 262-64 (citations omitted).

In applying this second part of the jurisdictional analysis, FNC argues that it never contemplated being required to defend an action on the other end of the country from its sole office, especially in light of the fact that contract between the parties is governed by California law. FNC takes this position

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Court agrees with Defendant in that FNC's contacts with Pennsylvania were brief and sporadic rather than "continuous and systematic."

even though it solicited ATI's services. Furthermore, FNC could just as easily have added a forum selection clause to the Agreement to ensure that it would not have to defend outside of its chosen forum. Thus, it is reasonable to assert jurisdiction over FNC, since the burden on FNC is not so severe as to be inequitable.[7]

Moreover, Pennsylvania has an interest in protecting its residents from out-of-state corporations. In addition, it has a manifest interest in providing an in-state means of redress for its residents if they are injured by an out-of-state defendant. And there is no indication that judicial resources would be wasted here or that the interests of justice would be better served in another forum. Accordingly, FNC's motion to dismiss for lack of personal jurisdiction shall be denied.

(b) Payment Not Yet Due

Even if this Court has personal jurisdiction over FNC, FNC argues that there are still meritorious defenses going to the substance of ATI's claims that justify setting aside a default judgment. More specifically, FNC points to paragraph 10 of the contract between the parties which expressly provides that payment by FNC is not due until three business days after FNC has

[7] FNC has not identified any difficulties, such as witness or document transportation expense, that would arise if this litigation continued in this Court.

received the corresponding payment from its client.[8] (Compl., Ex. A, at ¶ 10.) FNC's Chief Operating Officer, Mr. Hutcherson, has stated that FNC has not received payment from its clients for most of the telemarketing work for which ATI is now seeking payment.[9] (Hutcherson Decl., dated 1/14/2000, at ¶ 7). Thus, FNC argues that the express terms of the contract provide that FNC is not yet required to make payment to ATI.

ATI responds by arguing that the contractual provision on which FNC relies is not a condition precedent and, therefore, it cannot excuse FNC's failure to make payment. According to ATI, the California and Pennsylvania courts have held that such clauses are merely intended to describe the timing of payment and not to shift the burden of loss to a subcontractor should a contractor not receive payment from its client. Additionally, ATI argues that the meritorious defense must be a complete defense in order to set aside a default. In this regard, ATI asserts that Yellow Web's failure to pay FNC would not be a complete defense because many of the payments at issue here pertain to the work that ATI performed on behalf of FNC's other two clients, Jet and ACE.

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[8] The attachment to the contract, in paragraph IX, reaffirms this provision. (Compl., Ex. B, at ¶ IX.)

[9] FNC brought a collection suit against Yellow Web/Webviper, the principal FNC client for which ATI was working. See Def.'s Mot. to Set Aside Default at 12 (citing Hutcherson Decl. at ¶ 7).

A review of the subcontract between the parties shows that the provision at issue aims at deferring payment to ATI until FNC is paid. As stated above, the parties' contract in this case is expressly governed by California law, which not only recognizes a significant body of case law holding that a "pay when paid" clause only permits payment to be delayed for a reasonable time after the completion of the work under the subcontract, but finds such provisions, in a construction context, to be unenforceable. See Capitol Steel Fabricators v. Mega Constr. Co., 58 Cal. App.4th 1049, 1057, 68 Cal. Rptr.2d 672, 678 (1997). However, FNC also argues that the delay in payment by its clients may be attributable to complaints about the quality of ATI's work. (FNC's Reply Mem. at 5) (citing Hutcherson Decl. at ¶¶ 7, 9). If proved at trial, this might constitute a complete defense to the breach of contract claim. Cf. Yamanishi v. Bleily & Collishaw, 29 Cal. App.3d 457, 105 Cal. Rptr. 580 (1972).

4. Alternative Sanctions

Alternative sanctions have been issued in cases where the court is troubled by the manner in which the party seeking to set aside default has conducted itself. See Foy v. Dicks, 146 F.R.D. 113, 117-18 (E.D. Pa. 1993). However, in cases, like the instant action, where there is no evidence of bad faith or willful misconduct, courts have found it inappropriate to impose

punitive sanction. See East Coast Express v. Ruby, 162 F.R.D. 37, 40 (E.D. Pa. 1995). Here, as already discussed above, FNC's delay in responding to the Complaint due to its difficulty in obtaining counsel was not willful and does not constitute bad faith. Accordingly, an alternative sanction is not warranted under the circumstances of this case.

For all of the above reasons, this Court will deny Plaintiff's Motion for Entry of Judgment by Default, grant Defendant's Motion to Set Aside Default and deny Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN TELECOM, INC., Plaintiff,	:	
v.	:	CIVIL ACTION NO. 99-3795
FIRST NATIONAL COMMUNICATIONS NETWORK, INC., Defendant.	:	

ORDER

AND NOW, this 2nd day of June, 2000, upon consideration of Plaintiff's Motion for Entry of Judgment by Default, Defendant's Motion to Set Aside Default and to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction, and all responses thereto, the following is hereby ORDERED:

1. Plaintiff's Motion for Entry of Judgment by Default is DENIED;

2. Defendant's Motion to Set Aside Default is GRANTED; and

3. Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is DENIED.

BY THE COURT:

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ROBERT F. KELLY, J.